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The High Court considers 'market' for the purposes of the *Competition and Consumer Act 2010* and when it is 'in Australia'.

On 14 June 2017 the High Court handed down its decision in *Air New Zealand Ltd v ACCC* and *ACCC v PT Garuda Indonesia Ltd*[1] determining whether the price fixing by the airlines of unidirectional air cargo transport services from specific overseas ports to specific Australian ports occurred in a 'market in Australia' within the meaning of s 4E of the *Trade Practices Act 1974* (TPA) (now the *Competition and Consumer Act 2010* (CCA)) and thus contravened s 45 of the TPA.

Background

The ACCC brought separate proceedings against 15 airlines alleging that they had entered into price fixing arrangements in various countries in relation to the supply of air freight services from those countries to Australia. The arrangements principally related to agreements between airlines to impose fuel surcharges at an agreed level. AGS acted for the ACCC throughout.

The airlines concerned had progressively admitted liability for contraventions and, by the commencement of the hearing on 6 November 2012, before Perram J, only 4 airlines remained contesting the proceedings. Two more settled soon after and the trial proceeded against Air New Zealand and Garuda. The trial ran for 57 hearing days.

Perram J found that s 45 would have been contravened on numerous occasions and by numerous arrangements, but for his finding that the markets in which the price fixing occurred were not 'markets in Australia', and thus liability under s 45 did not attach. This was principally because the 'switching decisions' of customers could only be made at the origin of the flight and thus that was taken to be where substitution occurred. His Honour had also found, inter alia, that the airlines carried on business in Australia, maintained operations in Australia, that some of the barriers to entry were here and that they necessarily provided a significant part of the services in Australia. He found that, although freight forwarders acted as intermediaries and contracted directly with the airlines at origin on behalf of some customers, they also recognised larger Australian shippers as the source of a material part of their business and actively competed here for the custom of those shippers.

The ACCC appealed to the Full Federal Court on the issue of the market, and the respondents raised some 70 grounds of contention. The hearing in the Full Court ran for 6 days. The Full Court by majority (Dowsett and Edelman JJ, Yates dissenting) found the market concerned to indeed be in Australia and dismissed all of the points of contention. The airlines appealed from that decision to the High Court. Other grounds appealed on, all of which were unanimously rejected by all Courts, are not dealt with in this note.

[1] [2017] HCA 21.

The High Court's decision

The issues before the High Court in determining whether the market was in Australia included:

1. How does an abstract concept such as a market, particularly when the competition it encompasses is a process rather than an event, conform to a concrete geography such that it can be said to be 'in Australia'?
2. What is the correct approach to market definition?
3. What is the function in market definition of aspects or indicia such as the place/s of contracting; of supply or performance; of barriers to entry; of the source of immediate and ultimate custom and demand; of marketing or other significant acts of rivalry for that custom?
4. Which of the available perspectives, including those of regulators, market participants and economists, should most inform the analysis?

The judgments

The majority[2] commenced their reasons by observing that the facts of the cases lead 'irresistibly to the conclusion that there was a market in Australia for the airlines' air cargo services'.[3] They found, and observed that neither side disputed, that the market could be both in Australia as well as in other places.[4] Their Honours affirmed that the 'exercise of market definition needs to take into account the conduct in question and its effects, and the statutory terms governing the question'.[5]

Their Honours addressed all the issues above in common vein: as the statute regulates the conduct of commerce, the issue of market location ought to be addressed 'as a practical matter of business'[6] observing, as the Court did in Flight Centre[7] that any analysis of competitive processes involved in the supply of a service must not be divorced from the commercial context of the conduct in question. The other members of the Court shared this view.[8]

Through this lens, it should first be noted that their Honours made extensive reference to the facts as found and the views of market participants,[9] rather than to the evidence of the economists called. A critical aspect of reliance on commercial perceptions and commercial reality is that the substance of competition and transactions will be preferred over their form.

The Court held that while many of the indicia of a market, including the locus of substitution, of barriers to entry, the place of contracting, the place of performance or the location of buyers or sellers will almost always be relevant, none is of itself always determinative of the issue. What they all do is *indicate* 'the location of the mechanism or facility which accommodates the process of rivalry and matching [of demand and supply] to the concept of a market'.[10] It is that which will answer the question of a market's geography.

Given that the services supplied by the airlines were to be supplied to ports in Australia, in response to material demand generated by airlines in Australia, it was held that as a matter of commerce the area

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[2] Keifel CJ, Bell and Keane JJ.

[3] At paragraph [5].

[4] At paragraph [15].

[5] At paragraph [26].

[6] At paragraph [14].

[7] (2016) 91 ALJR 143 at 156, paragraph [70].

[8] See eg paragraph [125].

[9] At paragraph [19]-[21], see also paragraph [96]–[118].

[10] At paragraph [28]. The conclusions of Gordon J, Nettle J concurring, are consonant, see eg paragraph [121].

where the interplay of supply and demand occurs would include Australia and this was consonant with the requirements of s 4E.[11] This area was the essential integer of the market to be located.

A critical distinction about the relevance of substitutability to market location is addressed at [27][12] where their Honours observed that the act of switching or substituting one product for another is the *outcome* of the process of rivalry. The rivalry and the switching may occur in the same or different locations. It is the area where the former occurs that will be the basis for locating the market. These observations are shared by Gordon J[13] who further points out[14] that this approach in a case where the airlines carried on business in Australia and fixed prices to customers in Australia for whose business they were striving is consistent with the objective of the TPA/CCA in s 2 to enhance the welfare of Australians through the promotion of competition.

Implications

1. The indicia of the location of a market are exactly that. They can be, but need not be, decisive of the market or its geographical location for the purposes of s 4E. It will be defined by the locus that appropriately encompasses the process of rivalry and the matching of demand to supply.
2. The Court has strongly affirmed the course of recent decisions that a commercial and practical approach to interpretation is to be used in applying the CCA, including s 4E, with the perspectives of participants to prevail over those of economic experts, to the extent they are inconsistent. The definition is to address the competition problem at hand in the context of the alleged contravention. There are no bright lines.
3. There is good reason to think that emerging issues of international commerce, and particularly that concerning supply of intangibles such as music or programs or games that do not readily lend themselves to traditional notions of supply or location, will be amenable to Australian competition law when the products are materially marketed to and acquired by Australians in Australia.
4. The commercial and practical focus will cause the Court to look through the particular form supply arrangements might take to their practical and commercial substance.

For further information please contact:

Glenn Owbridge
Special Counsel Competition and Consumer Law
T 03 9242 1462
glenn.owbridge@ags.gov.au

Jody Marshall
Senior Executive Lawyer
T 07 3360 5751
jody.marshall@ags.gov.au

Kathryn Gordon
Senior Lawyer
T 03 9242 1352
kathryn.gordon@ags.gov.au

[11] At paragraph [29].

[12] See also at paragraph [88] et seq.

[13] At paragraph [121], Nettle J concurring.

[14] At paragraph [122].